THE EVOLUTION OF FEDERAL REGULATION OF INTRASTATE RATES: THE SHREVEPORT RATE CASES

"POWERFUL and ingenious minds, taking as postulates that the powers expressly granted to the government of the Union, are to be contracted by construction into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well-digested but refined and metaphysical reasoning founded on these premises, explain away the constitution of our country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use." [1]

"By virtue of the comprehensive terms of the grant the authority of Congress is at all times adequate to meet the varying exigencies that arise, and to protect the national interest by securing the freedom of interstate commercial intercourse from local control." [2]

The first quotation is from Chief Justice Marshall's opinion in *Gibbons* v. *Ogden*, the great pioneer decision that defined the commerce clause of our Constitution. That opinion was rendered in 1824. That was ninety years ago. The second quotation is from Mr. Justice Hughes' opinion in the so-called Shreveport Rate Cases decided last June. In the one case, Chief Justice Marshall declared that the State of New York could not grant a monopoly in the use of its navigable waterways. In the other, Mr. Justice Hughes declared that the State of Texas could not maintain rates of transportation, however reasonable in themselves, between points within its boundaries, if these rates were discriminatory against rates ordered by the Interstate Commerce Commission to be maintained between points within and points without the State of Texas. The one decision purports to be warranted by the other.

The language of the two quotations differs only in phraseology. The meaning intended to be conveyed is the same in both. They both affirm in absolutely definite terms the paramount authority

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[1] Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 222.

[2] Houston East & West Texas Ry. Co. *v.* United States; Texas & Pac. Ry. Co. *v.* United States, 234 U. S. 342, 351.

of Congress over interstate commerce. Therefore to the lay mind, and indeed to those lawyers who have not undertaken a close study of the development of our constitutional law through judicial interpretation or judicial amendment (and for the purpose of our subject, of course, it is only with judicial interpretation and judicial amendment that we are concerned, because the commerce clause has thus far escaped all direct modification), it would seem that the construction placed upon this, the most vital clause of our whole Constitution, is no different from the construction placed upon it by the remarkable prescience of Chief Justice Marshall at the time when the Constitution was still in its infancy and railroads, and therefore railroad rates, were things unknown. But is it true that the construction is the same? This question is not capable of an absolutely conclusive answer for the obvious reason that Chief Justice Marshall could not foresee, and therefore his definition cannot be said to apply without qualification to, present-day conditions. This is said, of course, with full appreciation of the well-established principle that the reasons which may have caused the framers of the Constitution to repose the commercial power in Congress, and upon which our early justices necessarily largely relied, do not limit the extent of the power itself.[3] Whether Chief Justice Marshall, were he living to-day, would reason as do the members of our present court is a matter of the purest conjecture; but even assuming that he would, the all-important fact remains that during this long period of ninety years agreement has by no means prevailed in the opinions expressed by the Supreme Court from time to time upon the scope of the commerce clause. An analysis of the opinions in the various cases shows widely dissimilar views. Here we will find an expansion of the commerce clause, there a contraction. Each view has a certain historical or economic significance. That there is this variance is by no means unusual. It is but the evolution of this branch of our constitutional law. The questions of police power, taxation, due process and equal protection of the laws, not to mention innumerable other questions, have each, in their turn, been subjected to a similar process of development. These evolutions have been largely con-

[3] See Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 228 (1899), in which this principle is very forcibly enunciated.

structive, not destructive. They represent a progressive trend of thought, and yet one ever mindful of our government's constitutional limitations. In some cases there were no such convincing precedents as those dealing with the commerce clause upon which to build. Occasionally precedents have been overruled expressly, because found to have been clearly erroneous, or impliedly, because of the stress of economic conditions, — nullification by indirection, if you will. But, for the most part, there has been a more or less successful attempt to square the latest decisions with the fountain heads that have gone before. To this general rule, however, the evolution of the commerce clause, in so far as it relates to the regulation of intrastate rates, is believed to be an exception, and it is the purpose of this article to trace this evolution by an analysis of the decisions which have brought it about.

The evolution of federal regulation of intrastate rates is properly to be traced by dividing the decisions construing the power of Congress over interstate commerce into five periods, each of which is more or less distinctly defined by reason of particular interpretations placed upon the commerce clause. The first period dates from the adoption of the Constitution in 1789 to 1829. This period is noteworthy in that it evolved these two basic principles: First, that the actual regulation of interstate commerce by Congress excludes its regulation by the states. Second, that the power to regulate purely internal commerce rests exclusively with the states regardless of whether they actually exercise this power or not. This period will be called the Constructive Period.

The second period dates from 1829 to 1876, the year of the so-called Granger Cases.[4] This period is noteworthy in that in addition to upholding the two basic principles of the first period, it gradually evolved, although not without great controversy, a third basic principle, namely, that in matters essentially national in their nature and requiring uniformity of regulation the exclusiveness of congressional power is not dependent upon actual exercise of that power, but arises from the very grant itself of the power; while in matters which, though affecting interstate commerce, are primarily of local interest, the power of the states to regulate is

[4] Munn *v.* Illinois, 94 U. S. 113; Chicago, B. & Q. R. R. *v.* Iowa, 94 U. S. 155; Peik v. Chicago & N. W. Ry. Co., 94 U. S. 164; Winona & St. Peter R. R. Co. *v.* Blake, 94 U. S. 180.

plenary in the absence of congressional action. This latter power is generally, though it would seem rather inaccurately, described as concurrent. The use of the word "concurrent" rather conveys the idea of simultaneous operation of the state and the federal power, whereas the one operates only when the other is not exercised. From the fact that the state power is dominated by, and must give way to, the federal power when exercised, it would seem perhaps more accurate to speak of the one power as *dominant* and of the other as *servient*. This second period will be called the States' Rights Period.

The third period, one of only ten years, dates from 1876 to 1886, the year of the decision in the case of *Wabash, St. L. & P. Ry. Co.* v. *Illinois*.[5] The decisions of this period are noteworthy in that they further extend the principle of so-called "concurrent" power to the point of saying that until Congress acts the states themselves may even regulate matters essentially national in their nature, namely, interstate rates, as well as those matters primarily of local interest. This period will be called the Extreme States' Rights Period.

The fourth period dates from 1886 down to but not including the so-called Minnesota Rate Cases,[6] decided in 1913. During this period the decisions affirm the three principles enunciated in the first and second periods, and repudiate the Extreme States' Rights principle of the third period. This fourth period will be called the Federalistic Period.

The fifth and last period dates from the decision rendered in 1913 in the Minnesota Rate Cases to the present time, and therefore includes the decision in the Shreveport Rate Cases[7] rendered last June. This period is noteworthy for the further and hitherto unknown restriction of state power. A principle never before announced is now evolved to the effect that state regulation of local rates is exclusive only until Congress acts, or, in other words, that the power of the state is servient not merely in local matters affecting interstate commerce, but in the regulation of its own internal commerce as well. In short, it does not allow the corresponding usurpation to the federal government that was allowed to the states during the third or Extreme States' Rights period, that is,

[5] 118 U. S. 557. [6] 230 U. S. 352. [7] 234 U. S. 342.

regulation of intrastate rates until the states themselves regulate them, for of course that would be valueless; but it goes further and proclaims that there may be regulation of intrastate rates by Congress to the exclusion of state regulation whenever Congress may see fit to act. In addition, with the Interstate Commerce Commission, an agent of Congress, be it noted, is primarily vested the determination of this fundamental constitutional question, namely, whether state action is to be excluded, or, in short, whether the commerce clause has been violated. This last period will be called the Period of Judicial Amendment, so radical is it in its extension of the doctrine of national supremacy. The leading decisions of each period will now be considered.

I. The Constructive Period

At the time of the adoption of the Constitution, commerce "among the several States,"[8] to use the exact words of the commerce clause, consisted of touching the circumference of the states by the landing of vessels at coastwise points, and of transportation by land from one state to another, such as it was, by coach or wagon. The penetration and commingling of external and internal commerce is a product of the railroad and so unknown to our forefathers. To use the words of Henry Clay, "The country had scarcely any interior."[9] While it is believed that by the language used in the Constitution more was in fact actually contemplated than transportation by water,[10] it is quite clear that nothing more was immediately intended, either by the Federal Convention which framed the Constitution or by the state conventions which ultimately gave their approval, than to enable Congress to prevent the imposition of duties by particular states upon articles imported from or through other states. This power

[8] Article 1, sec. 8, c. 3.

[9] Speech in House of Representatives, January 30, 1824; Annals 18th Congress, 1st Session, Vol. I, pl. 1315.

[10] See *contra*, "Chief Justice Marshall on Regulation of Interstate Carriers," by E. Parmalee Prentice, 5 Col. L. Rev. 77. Mr. Prentice bases his argument on the fact that states continued to grant monopolies to ferry and canal companies, land transportation companies and even to railroads as late as 1866, when, as we shall see, Congress intervened. See also, by the same author, "The Federal Power over Carriers and Corporations," and "The Origin of the Right to Engage in Interstate Commerce," 17 Harv. L. Rev. 20.

given to Congress was thought to be merely negative, not affirmative. In short, it was conceded to the federal government, with virtually no debate, as supplementary to the attainment of the greatest object of the new government — destruction of state jealousies with regard to foreign commerce and the abuse of power by the importing states in taxing the non-importing, which had been so detrimental to harmony and progress under the Confederation, and in the place of these the establishment of one rule of uniformity.[11]

Although Chief Justice Marshall, with his broad discernment, saw the futility of declaring the power to regulate interstate commerce to be merely negative and gave to it at once an affirmative significance, the facts to which he applied his definition were so dissimilar to the facts with which we have to deal, that however broad, however elastic, he may have intended his definition to be, we cannot go beyond a reasonable construction of his words in any case. In *Gibbons* v. *Ogden* he decided that the laws of New York which granted to the successors of Livingston and Fulton the exclusive right to navigate with their steamboats all waters within the state, for a term of years, was an unconstitutional restriction

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[11] See Elliott's "Debates on the Federal Constitution"; "The Federalist," Nos. 7, 11, 42; Max Ferrand, "The Records of the Federal Convention of 1787"; "The Framing of the Constitution."

On February 13, 1827, James Madison, writing from his home at Montpelier to his friend J. C. Cabell, remarked in regard to the power of Congress over interstate commerce: "I always foresaw that difficulties might be started in relation to that power which could not be fully explained without recurring to views of it which, however just, might give birth to specious though unsound objections. Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it, yet it is very certain that it grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the states themselves rather than as a power to be used for the positive purpose of the general government in which alone, however, remedial power could be lodged." Letters and Other Writings of James Madison, Vol. 4, pp. 14–15.

Strange as it seems, this was written three years after the decision in Gibbons *v.* Ogden. Madison's successor in the Presidency, James Monroe, actually believed that Congress had no power to make internal improvements by virtue of the Commerce Clause of the Constitution, on the theory that that clause merely gave power to impose duties on foreign trade, and to prevent duties on trade between the states, — or in fact by virtue of any other power granted to Congress. See James Monroe's Message to Congress of May 4, 1822, and accompanying paper on the subject of internal improvements, vetoing the act for the preservation and repair of the Cumberland Road.

of interstate commerce, because it prevented vessels licensed to carry on the coasting trade under the laws of the United States from navigating those waters in the prosecution of that trade.

Difficult as this decision must have been to render as an original proposition, embracing as it did the announcement of national supremacy at the expense of the states, which was the basis of all the opposition to the new form of government, it was, from a judicial point of view at least, not so difficult as the determination of the present-day problems arising out of our complex commercial life and the complete inter-relation of almost all railroad rates. Let us analyze the opinion of Chief Justice Marshall. First, the word "commerce," he said, as used in the Constitution "comprehends, and has always been understood to comprehend, navigation."[12] And whatever conflicts there may have been as to the scope of the commerce clause, he set them at rest by declaring with equal emphasis that it "comprehends every species of commercial intercourse,"[13] thus paving the way for the application of the commerce clause to railroads, which, however, was not directly utilized, as we shall see, until forty-eight years later. Second, he thus defined the distinction between interstate and intrastate commerce:

"Commerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal

[12] 9 Wheat. (U. S.) p. 193.

[13] *Ibid.*, p. 193.

concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself. . . . Commerce among the states must, of necessity, be commerce with the states." [14]

Third, he decided — and this is the real *ratio decidendi* of the case — that a state cannot regulate interstate commerce while Congress is regulating it. Lastly, by declaring that there was an "immense mass of legislation, which embraces every thing within the territory of a state, not surrendered to a general government: all which can be most advantageously exercised by the states themselves," [15] he adopted the far-seeing views of Daniel Webster (who argued the case for the appellant), which, as we shall see, succeeding justices were slow to grasp, and which gave rise to a stubborn controversy lasting nearly thirty years.

In rendering the court's opinion, Chief Justice Marshall was mindful of the vast importance and far-reaching effect of the decision, and therefore of the wisdom of not proceeding too far beyond what was necessary for the purposes of the case. "The magnitude of the question," he said, "the weight of character belonging to those from whose judgment we dissent, and the argument at the bar, demanded that we should assume nothing." [16]

In short, in declaring the power of Congress over interstate commerce to be paramount, he did so with application only to the particular facts of the case, and did not decide, because unnecessary to do so, that the mere grant of this power made it *ipso facto* exclusive. "In discussing the question, whether this power is still in the states, in the case under consideration," he said, "we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a state regulate

[14] 9 Wheat. (U. S.) pp. 194–96.
[15] *Ibid.*, p. 203.
[16] *Ibid.*, p. 222.

commerce with foreign nations and among the states, while Congress is regulating it?" [17]

The negative answer given to this question is stated by a masterly course of constructive reasoning in the most positive terms. So from the time of this decision there could no longer be any doubt that when Congress regulates interstate commerce that action is absolutely exclusive. This principle was conclusively affirmed three years later by Chief Justice Marshall in *Brown* v. *Maryland*,[18] an indestructible precedent, remarkable in its expression, of our constitutional law. An act of the legislature of Maryland, which imposed a license fee of fifty dollars on importers of foreign goods before they could sell them, was held unconstitutional, as violating both the constitutional provision against state taxation of imports and exports and the commerce clause. Chief Justice Marshall said as to the latter: "What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states? This question was considered in the case of *Gibbons* v. *Ogden*, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior. We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned." [19]

This case would seem to set at rest the question, reserved in *Gibbons* v. *Ogden*, as to whether there was a residuum of equal power vested in the states which might be exercised by them in the absence of congressional action. Nevertheless, confusion seems to have been engendered by a decision handed down by Chief Justice Marshall himself the following year, and with this the States' Rights period may properly be said to begin.

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[17] 9 Wheat. (U. S.) 200. It might be argued that the case could have been disposed of simply by declaring that the state action, being in violation of existing acts of Congress, was therefore void by the express language of Article Six of that Constitution.

[18] 12 Wheat. (U. S.) 419 (1827).

[19] *Ibid.*, p. 446.

II. The States' Rights Period

In the case of *Willson* v. *The Black Bird Creek Marsh Company*,[20] the State of Delaware had authorized a company to dam a small navigable tidal creek for the purpose of reclaiming marsh land and improving the drainage of the surrounding territory. The defendants, owners of a sloop licensed as a coaster under the laws of the United States, ran into the dam with the vessel and injured it. In an action for damages the defendants contended that the state law authorizing the building of the dam was an unconstitutional interference with interstate commerce, but Chief Justice Marshall held not, saying:

"If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states, we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states, a power which has not been so exercised as to affect the question.

"We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state or as being in conflict with any law passed on the subject." [21]

Unfortunately Chief Justice Marshall makes no mention of the cases of *Gibbons* v. *Ogden* and *Brown* v. *Maryland* in this decision, but obviously, from his language just quoted, he intended that nothing that he had said in those cases should be modified. The problem there presented was quite different, and Chief Justice Marshall must be considered as having so viewed it. In *Gibbons* v. *Ogden* and *Brown* v. *Maryland* the subject was in its nature national, and therefore admitted of only one uniform system or plan of regulation. In the Black Bird Creek Marsh Company case the subject was primarily of local interest, and in the absence of con-

[20] 2 Pet. (U. S.) 245 (1829).

[21] *Ibid.*, p. 252.

gressional action admitted of state regulation. True, Chief Justice Marshall stated in this case that the state action was repugnant neither to the power to regulate commerce in its "dormant state" nor to any law passed by Congress by virtue of that power, and this at first somewhat confuses the distinction between cases in which congressional jurisdiction is exclusive *per se* and in which it is not. But the language in the rest of the opinion shows that the non-action of Congress was the decisive feature of the case, and that the "dormant state" of congressional power was referred to simply to show that the local regulation was not directed to such a subject as was properly covered by the mere grant of power to Congress. If this explanation is sound, then it must be accepted as answering in the affirmative the question reserved in *Gibbons* v. *Ogden*, namely, that even if Congress had not legislated, would the New York statute involved in that case have been void from its inception?

Clear as is this distinction now between those subjects over which the power of Congress is exclusive *per se*, and those over which it is merely dominant until put into operation, it was not conclusively enunciated by a majority of the Supreme Court in any case until 1851, or twenty-two years after the decision in the Black Bird Creek Marsh Company Case. During those years the opinions of the court were many times at variance with each other. The cause of this lies, however, not so much in a failure to grasp the distinction which Chief Justice Marshall intended to make, but in the fact that the question of state versus national sovereignty had become much more prominent in the ripening of events which afterwards brought about the Civil War. The personnel of the Supreme Court underwent a great change. Many of its members were advocates of the Extreme States' Rights theory. The battle really began with the case of *City of New York* v. *Miln*,[22] decided in 1837, the first case in which the court was divided in its judgment of the commerce clause, and reached its highest pitch in the License Cases [23] and the Passenger Cases,[24] decided in 1847 and 1849. A close analysis of the varied opinions in these three cases would itself fill a book. Suffice it to state briefly the facts and the principles announced.

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[22] 11 Pet. (U. S.) 102. [23] 5 How. (U. S.) 504. [24] 7 How. (U. S.) 283.

In *City of New York* v. *Miln* there was held valid a law of the State of New York requiring, among other things, the masters of all vessels arriving at the port of New York from the ports of other states or countries to make to the state authorities, within twenty-four hours after arrival, a written report containing the name, birth-place, last legal settlement, age and occupation of every passenger to be landed. The law was upheld on the ground that it was a police measure, not a regulation of foreign or interstate commerce, and formed a portion of that "immense mass of legislation which," according to *Gibbons* v. *Ogden*, "embraces everything within the territory of a state, not surrendered to a general government: all which can be most advantageously exercised by the states themselves." [25] The opinion of the court was written by Mr. Justice Barbour, and concurred in by Mr. Justice Thompson in a separate opinion. It is significant that Mr. Justice Story, failing to admit the distinction intended to be laid down by Chief Justice Marshall in *Gibbons* v. *Ogden* between matters of national and matters of local interest, dissented.[26]

The License Cases involved the validity of certain laws of the States of Massachusetts, Rhode Island and New Hampshire prohibiting the sale of liquor without licenses previously obtained from the state authorities. The entire court, led by Chief Justice Taney, sustained the validity of the laws, but the members were very much divided as to the reasons upon which the decision should be based. Chief Justice Taney took the position that the state laws were regulations of foreign and interstate commerce in so far as they operated to impose burdens upon the sale in original packages of liquor brought into the state, but he held that the power to regulate such commerce was concurrent, and that, consequently, the laws were valid. Here, again, we see a failure, or at least a refusal, to grasp the distinction between matters which are of national and those of purely local interest. Justice Catron agreed substantially with the Chief Justice. Justices McLean, Grier and

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[25] 9 Wheat. (U. S.) 203.

[26] Mr. Justice Story's argument was that on the first hearing of the case, which was before Chief Justice Marshall, the latter agreed with his views. The case was originally brought to the Supreme Court on a certificate of division in opinion of the judges of the United States Circuit Court for the Southern District of New York. The Supreme Court itself being divided, a re-argument was directed.

Daniel sustained the laws on the ground that they were police measures and not within the prohibition of prior decisions. Justice Woodbury, adopting the same view, went further, however, and declared with Chief Justice Taney that the power to regulate interstate commerce was concurrent. This theory, although not applicable to the facts in these cases, was to a large extent that suggested by Daniel Webster's argument in *Gibbons* v. *Ogden*, and which, as has been pointed out, is believed to have been intended by Chief Justice Marshall as the proper one. Certainly it approximates the one that has since been adopted by the court, namely, that the federal power over commerce is exclusive in so far as from the nature of the case a uniform regulation is demanded or is appropriate, but that in matters of purely local and particular interest the states may, in the absence of opposing federal statutes, legislate. "I admit," said Mr. Justice Woodbury, "that so far as regards the uniformity of a regulation reaching to all the states, it must in these cases, of course, be exclusive. . . . But there is much in connection with foreign commerce which is local within each state, convenient for its regulation, and useful to the public, to be acted on by each until the power is abused or some course is taken by Congress conflicting with it." [27] But Justice Woodbury failed to make the proper classification of subjects. It is strange, in a sense, that any of the Justices could have wandered so far from the irrefutable logic of *Brown* v. *Maryland*. On the other hand, it must be remembered that they were dominated by a grave political situation, with one party seeking to establish complete national powers for a government which the other party regarded as a mere league of states. The controversy was only ended by civil war. Suffice it to say, however, for the purposes of our present discussion, that the License Cases were squarely overruled by the case of *Leisy* v. *Hardin* [28] in 1890.

In the Passenger Cases there was involved the validity of laws of Massachusetts and New York imposing a tax upon every nonresident passenger landed within the state from every vessel arriving from a port of some other state or country. These laws were very properly held invalid, the court, however, being divided five

[27] 5 How. (U. S.) 624.

[28] 135 U. S. 100. See Bowman *v.* Chicago & N. W. Railway Co., 125 U. S. 465 (1888).

to four. All of the Justices who delivered separate opinions in the License Cases delivered separate opinions in the Passenger Cases, as did also Justices Wayne and McKinley. The opinions of the respective Justices in both cases are substantially the same in so far as they bear upon the question of the so-called concurrency or exclusiveness of congressional power.

Here again a great political controversy was carried to the Supreme Court. The problem presented was more troublesome than that in the License Cases. On the one hand, the Constitution gave the citizens of each state the privileges and immunities of citizens of the several states. On the other hand, the Constitution left each state to determine for itself what immigration should be permitted. So far as land communication between the states was concerned, it was generally conceded that the states had never surrendered that power, and it was now urged that passengers by sea had no greater rights within a state than if they had come by land from an adjoining state. Absorbing as is the study of this controversy as exposed in the decisions of the Supreme Court, space does not permit that we pursue it further here.[29] Summarizing the notable features of these famous cases, together with the notable features of the License Cases, and viewing them primarily as abstract propositions of constitutional law relating to the commerce clause, as we here must, they are believed to be three in number. First, failure on the part of the members of the court to agree on *any* definition of the commerce power. Second, refusal to agree that the power of Congress was ever exclusive. Third, departure, except on the part of Mr. Justice Woodbury, from the doctrine which must reasonably be inferred from the cases of *Gibbons* v. *Ogden* and Black Bird Creek Marsh Company, and which was soon to be announced as the true rule of construction, namely, that in matters national the power of Congress is exclusive by the very grant, while in matters of local interest the power of the states is concurrent or servient to the dominant power of Congress when that power is exercised.[30]

[29] See Crandall *v.* Nevada, 6 Wall. (U. S.) 35. In this case, decided after the Civil War (1867), the Supreme Court affirmed the right of free passage from state to state, not, however, as a result of the construction of any provision of the Constitution, but because this right was considered essential to the existence and administration of the nation.

[30] See an article by Louis M. Greeley, "What is the Test of a Regulation of Foreign

Finally in 1851, in the case of *Cooley* v. *Board of Wardens*,[31] the Supreme Court, in an opinion delivered by Mr. Justice Curtis, established once and for all the rule which had been so often threatened with adoption since 1829, but in which a majority of the Justices had never been able entirely to concur. The facts of this case, briefly stated, are that by act of the legislature of Pennsylvania certain requirements were imposed upon the master of every vessel entering the port of Philadelphia to make certain reports to the harbor officials, and upon the failure to comply with these requirements so-called half pilotage fees were exacted. The plaintiff brought an action to recover these fees, claiming that the Pennsylvania law was in conflict with various provisions of the Federal Constitution, among them the commerce clause, with which alone we are here concerned. The court said:

"Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits." [32]

Mr. Justice Daniel in a short opinion agreed with the judgment of the court, but not with its reasoning, for he doubted whether this concurrent power in the state "which is deemed indispensable to the safety and existence of every community . . . could, under any circumstances, be surrendered." [33]

Mr. Justice McLean filed a very strong dissenting opinion [34]

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or Interstate Commerce?" 1 HARV. L. REV. 159, in which the author states that the only true test taken from Justice Woodbury's opinions is to be found in the intention or purpose of the state legislature in passing each given law. This, of course, is not entirely accurate. But see Thayer's "Cases on Constitutional Law," pp. 2190–91, where this question as to the need for local or national regulation is said to be inherently a legislative and not a judicial one.

[31] 12 How. (U. S.) 299.

[32] *Ibid.*, p. 319.

[33] *Ibid.*, p. 326.

[34] *Ibid.*, pp. 321–25.

based upon what he understood to be the dictum of Chief Justice Marshall in regard to pilotage laws as stated in *Gibbons* v. *Ogden.* Chief Justice Marshall did say in that case that Congress by the act of 1789 had adopted the pilotage laws of the states in order to give them full force and effect, and therefore that Congress had intended to pre-empt the field in so far as the whole question of pilotage was concerned, and that the states were thereafter precluded from passing any law whatsoever on the subject. It must be admitted that Mr. Justice McLean's reasoning is entirely logical and supported by the remarks of Chief Justice Marshall. However, admitting Mr. Justice McLean's dissent to have been justified by the particular facts of this case, there is nothing in his language or in that of Chief Justice Marshall which in any way weakens the correctness of the principle announced by the majority of the court through Mr. Justice Curtis. In short, that principle, while perhaps not applicable to the exact facts in *Cooley* v. *Board of Wardens,* is nevertheless the true guide. Often there has been great difficulty in obtaining any definite criteria by which to distinguish between the two classes of subjects, but the principle has remained the same to the present day.[35]

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[35] The leading cases classified are as follows: pilotage—Pacific Mail S. S. Co. *v.* Joliffe, 2 Wall. (U. S.) 450 (1864); Anderson *v.* Pac. Coast S. S. Co., 225 U. S. 187 (1912). Protection and improvement of navigable waters—Gilman *v.* Phila., 3 Wall. (U. S.) 713 (1865); Pound *v.* Turck, 95 U. S. 459 (1877); County of Mobile *v.* Kimball, 102 U. S. 691 (1880); Gloucester Ferry Co. *v.* Pa., 114 U. S. 196 (1885); Escanaba *v.* Chicago, 107 U. S. 678 (1882); Cardwell *v.* American Bridge Co., 113 U. S. 205 (1885); Huse *v.* Glover, 119 U. S. 543 (1886); Willamette Bridge Co. *v.* Hatch, 125 U. S. 1 (1888); Lake Shore & M. S. Ry. Co. *v.* Ohio, 165 U. S. 365 (1897); Cummings *v.* Chic., 188 U. S. 410 (1903); Manigault *v.* Springs, 199 U. S. 473 (1905). Regulation of wharfage charges or tolls—Packet Co. *v.* Keokuk, 95 U. S. 80 (1877); Cinn., etc. Packet Co. *v.* Catlettsburg, 105 U. S. 559 (1881); Parkersburg & Ohio River Transportation Co. *v.* Parkersburg, 107 U. S. 691 (1882); Ouachita Packet Co. *v.* Aiken, 121 U. S. 444 (1887); Sands *v.* Manistee River Imp. Co., 123 U. S. 288 (1887). Quarantine regulations—Hannibal & St. J. R. R. Co. *v.* Husen, 95 U. S. 465 (1877); Morgan, etc. S. S. Co. *v.* Louisiana, 118 U. S. 455 (1886); Missouri, Kansas & Texas Ry. *v.* Haber, 169 U. S. 613 (1898); Louisiana *v.* Texas, 176 U. S. 1 (1900); Rasmussen *v.* Idaho, 181 U. S. 198 (1901); Compagnie Francaise, etc. *v.* Board of Health, 186 U. S. 380 (1902); Reid *v.* Colorado, 187 U. S. 137 (1902); Asbell *v.* Kansas, 209 U. S. 251 (1908). Inspection laws—Turner *v.* Md., 107 U. S. 38 (1882); Plumley *v.* Mass., 155 U. S. 461 (1894); Patapsco Guano Co. *v.* North Carolina, 171 U. S. 345 (1898); Silz *v.* Hesterburg, 211 U. S. 31 (1908); Savage *v.* Jones, 225 U. S. 501 (1912). Laws governing nonfeasance or misfeasance of interstate carriers—Sherlock *v.* Alling, 93 U. S. 99 (1876); Johnson *v.* Chic., etc. Elevator Co., 119 U. S. 388 (1886); Smith *v.* Ala-

At this point it is proper to pause and consider for a moment what is the direct bearing that the principles, the development of which we have just traced, have upon the ultimate regulation by Congress of intrastate rates. All of these principles, it may be objected, were evolved from cases relating to water transportation. True, but at the very beginning Chief Justice Marshall defined the commerce clause as comprehending "every species of commercial intercourse." [36] The fact that railroads had not become important in our commercial life at the time these decisions were rendered should not be used as an argument that they are not fully applicable to railroads. And so the Supreme Court held, as soon as it was required to do so. The first real occasion arose in 1872 (although the court had dodged the question five years earlier),[37] in the case of the State Freight Tax,[38] where it was held, Mr. Justice Strong writing the opinion of the court, that a state tax upon interstate freight was in violation of the commerce clause.[39] "Beyond all question the transportation of freight," he said, "or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. . . . Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the states it must have been principally by land when the Constitution was adopted." [40]

In view of the broad, sensible definition that had been given to

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bama, 124 U. S. 465 (1888); Pearsall *v.* Great Northern Ry. Co., 161 U. S. 646 (1896); Louisville & Nashville R. R. Co. *v.* Ky., 161 U. S. 677 (1896); Hennington *v.* Georgia, 163 U. S. 299 (1896); N. Y., N. H. & H. R. R. Co. *v.* New York, 165 U. S. 628 (1897); Chic., Milwaukee, etc. Ry. Co. *v.* Solan, 169 U. S. 133 (1898); Lake Shore & Mich. Southern Ry. Co. *v.* Ohio, 173 U. S. 285 (1899); Pennsylvania R. R. Co. *v.* Hughes, 191 U. S. 477 (1903); Northern Securities Co. *v.* United States, 193 U. S. 197 (1904); Martin *v.* Pittsburg & Lake Erie R. R. Co., 203 U. S. 284 (1906); The Winnebago, 205 U. S. 354 (1907); Missouri Pac. Ry. Co. *v.* Larabee Mills, 211 U. S. 612 (1909); Missouri Pac. Ry. Co. *v.* Kansas, 216 U. S. 262 (1909); Davis *v.* C., C. C. & St. L. Ry. Co., 217 U. S. 157 (1910); Martin *v.* West, 222 U. S. 191 (1911); Mondou *v.* N. Y., N. H. & H. R. R. Co., 223 U. S. 1 (1912); Adams Express Co. *v.* Croninger, 226 U. S. 491 (1913); Michigan Central R. R. Co. *v.* Vreeland, 227 U. S. 59 (1913); Southern Pac. Co. *v.* Schuyler, 227 U. S. 601 (1913).

[36] 9 Wheat. (U. S.) 193.

[37] Crandall *v.* Nevada, 6 Wall. (U. S.) 35.

[38] 15 Wall. (U. S.) 232.

[39] See in this connection, State Tax on Railway Gross Receipts, decided at the same term, 15 Wall. (U. S.) 284.

[40] 15 Wall. (U. S.) 275.

the commerce clause, it is difficult to understand that any one should have attempted to exclude land transportation while including water transportation. As a matter of fact, counsel for the state in the State Freight Tax Case did resort to a somewhat more subtle method of reasoning, to the effect that the use of the word "regulate" in the commerce clause presupposed merely a rule to govern intercourse, and the tax in question was argued not to be a rule.[41] The real reason, of course, for such refinements and differences over what are now axiomatic, is the fact that railroads were still a new thing, and laws necessarily experimented with them, just as engineers experimented with the development of the mechanical and other phases of transportation before obtaining the desired results. How little the National Government had really awakened to its power over these great arteries of commerce is emphasized by the fact that as late as 1866 Congress felt the necessity of declaring by statute that every railroad had the right by virtue of the commerce clause to carry from state to state whomever and whatever it pleased and to receive compensation therefor. The validity of this statute was confirmed seven years later.[42]

III. The Extreme States' Rights Period

We have now traced the development of the commerce clause in the light of the leading cases up to approximately the year 1876. In that year began what may properly be known as the Extreme States' Rights Period in so far as the commerce clause is concerned, because it is noteworthy as the date of a number of cases which announced a principle hitherto unknown and exceeding in the extension of state power all principles that had previously been announced. The cases are: *Munn* v. *Illinois*,[43] *Chicago, B. & Q. R. R.* v. *Iowa*,[44] *Peik* v. *Chicago & N. W. Ry. Co.*,[45] and *Winona & St. Peter R. R.* v. *Blake*.[46] The question in each of these cases was, briefly stated, whether the authority of the state to limit by legislation the charges of common carriers within its borders was confined to the power to impose limitations in connection with grants of

[41] 15 Wall. (U. S.) 250–52.

[42] Chic. & N. W. Ry. Co. *v.* Fuller, 17 Wall. (U. S.) 560 (1873).

[43] 94 U. S. 113. [44] *Ibid.*, p. 155. [45] *Ibid.*, p. 164.

[46] *Ibid.*, p. 180. See also Chicago, M. & St. P. R. R. Co. *v.* Ackley, 94 U. S. 179; Stone *v.* Wisconsin, 94 U. S. 181.

corporate privileges. The court held not, and declared that the carriers were subject to legislative control as to the amount of their charges, except when protected by contract with the state. The question was presented by acts of the legislatures of Illinois, Iowa, Wisconsin and Minnesota, passed in the years 1871 and 1874 in response to a general movement for a reduction of rates. The section of the country in which the demand arose was to a large degree homogeneous and one in which the flow of commerce was only slightly concerned with state lines. This section had begun to feel the reaction and possibilities of development following the Civil War. In the first of these cases, *Munn* v. *Illinois*, the court did not have before it railroad rates, but grain elevator charges in Chicago. Through these elevators the grain from seven or eight western states was accustomed to pass *en route* to the East. Besides denying the state's legislative authority to limit these charges, it was urged that the act of Illinois violated the commerce clause. But the court, through Chief Justice Waite, in an opinion replete with learning, and notable for its extension of the doctrine of "public interest," declared otherwise. In the Munn Case, and also in each of the railroad cases that followed, the court decided that intrastate rates were a matter purely of state concern. Had the decisions rested here there would have been nothing unusual about them, but in the railroad cases the opinions went further, and declared that not only may a state regulate the purely intrastate business of a railroad, but that until Congress acts in reference to its interstate rates, the state may regulate them also. The expressions of opinion in each case on this point are short and admittedly received but little consideration, and have to a large extent therefore been considered as dictum. But assuming this to be true, since they have recently been adopted, as we shall presently see, as the basis for a most radical principle, the inevitable consequences of their announcement are too far-reaching to permit of mere superficial comment. Let us consider the exact words in each case bearing upon this question of state regulation of interstate rates.

In *Chicago, B. & Q. R. R. Co.* v. *Iowa* the court said through Mr. Chief Justice Waite, "It [the railroad] is employed in state as well as in interstate commerce, and, until Congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within

its own jurisdiction, even though in so doing those without may be indirectly affected." [47]

In *Peik* v. *Chicago & N. W. Ry. Co.* the Chief Justice again spoke as follows:

"The law is confined to state commerce, or such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the state. But certainly, until Congress undertakes to legislate for those who are without the state, Wisconsin may provide for those within, even though it may indirectly affect those without." [48]

In *Winona & St. Peter R. R. Co.* v. *Blake* the Chief Justice rendered merely a very short opinion for the court and stated that the case fell directly within the court's ruling in the cases just considered.

This new principle was not to survive long, for in 1886 the court had occasion to consider in a very important case the revolutionary effect that the language of the Granger Cases, if sustained, would necessarily have upon the power of Congress to regulate interstate commerce. As we have seen, in the second or States' Rights Period, which began in 1829 and ended in 1876 with these cases, the principle was developed of a dormant congressional power in local matters which when exercised meant the exclusion of state power from the same subject, but never had any of the cases gone to the extent of saying that in matters the regulation of which from their very nature rested in Congress, the states could interfere in the absence of Congressional action. In short, the Granger Cases represent not simply an extension of the principle of concurrent power finally established by the case of *Cooley* v. *Board of Wardens*, but amount in effect to an overruling of that first and fundamental principle which we found to have been foretold, if not actually established by *Gibbons* v. *Ogden*, namely, that the power of Congress in those matters requiring uniformity of regulation because national in their nature was exclusive from the very grant of the power, and was not dependent upon actual exercise of the power.

[47] 94 U. S. 163.

[48] *Ibid.*, pp. 177–78.

IV. The Federalistic Period

It was in *Wabash, St. L. & P. Ry. Co.* v. *Illinois* [49] that the court hastened to retract from its position maintained in the Granger Cases, and while emphatically maintaining that there was no question of the state's authority to regulate rates for transportation wholly intrastate, such authority went no further. In this case there was before the court a statute of Illinois which enacted that if any railroad company should charge or receive for transporting passengers or freight of the same class within the state the same or a greater sum for any distance than it did for a longer distance in the same direction, it should be liable to a penalty for unjust discrimination. The defendant railroad made such discrimination in regard to goods transported from Peoria, Illinois, and from Gilman, Illinois, to New York, charging more for the same class of goods carried from Gilman than from Peoria, the former being eighty-six miles nearer to the city of New York than the latter, this difference being in the length of the lines in the State of Illinois. The court held the statute invalid as a regulation of interstate commerce. Mr. Justice Miller, in delivering the opinion of the court, expressed some doubt as to whether the Illinois court's construction of the statute was correct in making it apply to commerce among the states, but said that the Supreme Court was bound by that construction.

Continuing, he explained that of the members of the court who had concurred in the dictum of the Granger Cases, there being two dissentients, but three remained, and that he, as one of them, was prepared to take his share of the responsibility. Then, after a thorough, analytical discussion of various cases [50] that had been decided since the Granger Cases, showing the radical language of the latter to have been at least indirectly repudiated, the court concluded:

"We must, therefore, hold that it is not, and never has been, the deliberate opinion of the majority of this court that a statute of a state

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[49] 118 U. S. 557 (1886).

[50] See County of Mobile *v.* Kimball, 102 U. S. 691 (1880); Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196 (1885); Pickard *v.* Pullman Southern Car Co., 117 U. S. 34 (1886); Stone *v.* The Farmers' Loan & Trust Co., 116 U. S. 307 (1886).

which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law." [51]

It is difficult to see any error in this decision, although three Justices dissented. There can be no questioning the fact that the rate sought to be regulated was an interstate rate. Obviously, if such transportation is not to be treated in its entirety, but as divisible by each state, then there would be not only utter confusion in rate-making, but the power of Congress over interstate commerce would be absolutely vitiated.

Pursuing our chronological consideration of cases, we find that by this time it had become a rather common practice for the states to create commissions, as agencies of state supervision and regulation, with rate-making power.[52] It is not necessary to analyze the numerous cases that defined this power. It is sufficient to name the more prominent ones in which the principles again established by the Wabash Case were reaffirmed: *Dow* v. *Beidelman*,[53] *Reagan* v. *Farmers' Loan & Trust Co.*,[54] and *Reagan* v. *Mercantile Trust Company*.[55]

The effect of intrastate rates upon interstate rates was seriously urged in *Smyth* v. *Ames*,[56] a case especially noteworthy as first announcing the true doctrine of due process of law, as required by the Constitution, in relation to railroad rates. Mr. Justice Brewer heard the cases in the lower court, and his pronouncement of the plenary powers of the states over their own local rates (the only phase of the case with which we are here concerned) was affirmed in the highest court by Mr. Justice Harlan.

Fourteen years later, however, trouble arose. In the case of *Louisville & Nashville R. R. Company* v. *Eubank*[57] the long and short haul clause of the Kentucky constitution was in issue. It had just been held in the same year in the case of *Louisville & Nashville R. R. Co.* v. *Kentucky* that this same section of the Kentucky constitution when applied to places, all of which were within the state, violated no provision of the Federal Constitution. But in

[51] 118 U. S. 575.

[52] See, for a summary of this legislation, Interstate Commerce Commission *v.* Cinc. N. O. & T. P. Ry. Co., 167 U. S. 479, 495–500 (1897).

[53] 125 U. S. 680 (1888). [54] 154 U. S. 362 (1894).

[55] *Ibid.*, 413. [56] 169 U. S. 466 (1898). [57] 184 U. S. 27 (1902).

the Eubank Case the facts were these: The defendant railroad exacted a rate of twenty-five cents per one hundred pounds on tobacco from Franklin to Louisville, both in Kentucky, and at the same time exacted on the same product from Nashville, Tennessee, to Louisville, over the same line, a rate of only twelve cents per one hundred pounds on account of water competition. The court held that the clause of the Kentucky constitution which forbade the railroad company to continue exacting a rate from Franklin to Louisville higher than the rate from Nashville to Louisville was void as a direct regulation of the interstate rate, namely, the rate from Nashville to Louisville, because for business reasons such a requirement would necessarily lead the company to raise its rate from Nashville rather than to reduce its rate from Franklin. In delivering the opinion of the court Mr. Justice Peckham said that the Wabash Case was not exactly in point, and yet, after a most minute analysis of it, he made it the real basis of the decision. He said:

"Is not this reasoning applicable here? The Nashville owner of tobacco wishes to have it transported to Louisville and asks the defendant to carry it. It responds that it would like to carry it at the rate of twelve cents per one hundred pounds, but that it cannot do so because it has established a reasonable rate between points both of which are in Kentucky, and which rates are more than twelve cents, and that if it were to carry at the rate of twelve cents from Nashville to Louisville it would be necessary, on account of the law of Kentucky, to carry at the same rate all tobacco between all points in that state, which would entail a loss in the business between those points, which the company would not be justified in sustaining; therefore the transportation is declined, for it cannot get more than twelve cents from the Nashville man. Is it an answer to this statement to say that the company can get this business by lowering its rates within the state to the same rate as charged from Nashville? Is it bound, in order to secure this interstate commerce, to lower its rates all through the state? If it be, is not the law which accomplishes this result a direct interference by the state with interstate commerce? And if it do not lower its state rates and in consequence must raise its interstate rates, in order to make its state rates valid, and thus must lose to an appreciable and important extent the interstate commerce, is not a law from which such necessary and direct consequences result a regulation in effect by the state, of that commerce which ought to be free therefrom?" [58]

[58] 184 U. S. 40.

In this case, from the very language of the proviso in the Kentucky constitution, there is obviously a closer approach to the direct regulation by the state of both the intrastate and interstate rates than in any case that we have previously considered. But even so, there is a clear distinction between the Eubank Case and the Wabash Case, and the failure of the court to give more weight to it has led to a decision which is believed to be open to much question, and which, as we shall see in a subsequent consideration of the Minnesota and Shreveport Cases, is largely responsible for the Supreme Court's announcement of a principle which it is impossible to defend by precedent. The distinction between the two cases is simply this: The rate sought to be regulated by the Kentucky constitution was an intrastate rate, while in the Wabash Case the rate sought to be regulated by the Illinois statute was an interstate rate. But what of the effect, it will be asked, upon the interstate rate that the regulation of the intrastate rate in the Eubank Case caused? This is admirably discussed in Mr. Justice Brewer's dissenting opinion, in which Mr. Justice Gray concurred. Mr. Justice Brewer said:

"But if a state may select as a standard the interstate rates prescribed by Congress and make its local rates the same, without interfering with interstate commerce, it would certainly seem that it could in like manner take the interstate rates which the carrier himself prescribes, and compel conformity of local rates thereto and still not be subject to the charge of interfering with interstate commerce. It is strange to be told that the action of a carrier in fixing interstate rates is potent to render unconstitutional the legislation of the state respecting local rates, when the like action of Congress in prescribing interstate rates is not so potent. In other words, action by the carrier in pursuit of its own financial interests overturns the constitution and statute of the state when like action by Congress in the exercise of its constitutional power does not. . . .

"I do not suppose it will be seriously contended that the defendant can invalidate all the local rates which the legislature of Kentucky may see fit to enforce by simply saying that outside of the state it somewhere touches a competitive point and is forced to reduce its interstate rates by reason of the competition there existing. . . .

"It seems to me, in conclusion, that a state legislature has full power over local rates, subject only to the restriction that it cannot require a carrier to carry without reasonable compensation, and that when it

legislates for local rates alone it may fix those rates by figures, or upon the basis of any standard which it sees fit to adopt, and the mere fact that it bases them upon some standard is not legislation regulating that standard — the local rates are alone the matter regulated. For these reasons I cannot concur in the opinion and judgment." [59]

It is a significant fact that until the Minnesota Rate Cases, decided in 1913, the Eubank Case was referred to by the Supreme Court only once,[60] and in several comparatively recent cases it would seem to have been virtually overruled — certainly the dissenting views of Justice Brewer were more nearly adopted.

The most apposite of these cases is *Missouri Pacific Ry. Co.* v. *Kansas*.[61] There the question was whether a railroad company could be compelled by a mandamus from the state court to obey an order of the Kansas Board of Railroad Commissioners requiring it to operate a passenger train between a point within the state and the state line. The road in question extended from Madison, Kansas, to Monteith Junction, Missouri, eighty-nine miles of it being in Kansas and nineteen miles in Missouri. There were no terminal facilities at Monteith Junction and the trains did not remain over at that point, but were run three miles further on in the State of Missouri to Butler Station. In holding that the order did not impose a direct burden upon interstate commerce when construed in accordance with its necessary effect, Chief Justice White said:

. . . "But under the hypothesis upon which the contention rests the operation of the train to Butler would be at the mere election of the corporation, and, besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed. *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328." [62]

Note the significant words used "at the mere election of the corporation." Similarly in the Eubank Case the effect on the interstate rate complained of by operation of the long and short haul clause of the Kentucky constitution, that is, the raising of the inter-

[59] 184 U. S. 45–49.
[60] Ohio R. R. Com. *v.* Worthington, 225 U. S. 101, 107.
[61] 216 U. S. 262 (1910).
[62] *Ibid.*, 284.

state rate to a parity with the local rate, was "at the mere election of the corporation," for the intrastate rate could have been lowered to a parity with the interstate rate, and would it "necessarily result that thereby a direct burden on interstate commerce would be imposed"?

From the date of the decision of the case of *Missouri Pacific Ry. Co.* v. *Kansas* just referred to, and the decision in the Minnesota Rate Cases, only three years elapsed. During that time the Supreme Court rendered no decision of particular significance in connection with the question with which we are here concerned, namely, the extension of federal power from the well-defined field of interstate commerce into the equally well-defined field of intrastate commerce. We have seen that while in the Eubank Case the reaction from the Granger Cases took this trend, in the *Missouri Pacific Ry. Co.* v. *Kansas* the pendulum again swung back, and from all that appears in the cases immediately following this decision one would not expect any radical departure from it. But there was such a departure, and in order to fully understand it, it is necessary to bear in mind two factors which are believed to be of very vital significance. These factors are, first, the crisis which had been reached in the excessive interrelation or overlapping of intrastate and interstate rates; and, secondly, the great change in the personnel of the Supreme Court at this time. It had fallen to the task of President Taft to appoint a Chief Justice and five new Associate Justices, Mr. Chief Justice Fuller, Associate Justices Brewer, Harlan and Peckham all having died, and Mr. Justice Moody having retired, within a short space of time. With the passing of these men, most of the more conservative thought passed also from our highest court, and there began with the new blood an era of the most dominant federalism.

V. The Period of Judicial Amendment

This new period, which we have called the period of Judicial Amendment, began with a reconstructed court in 1913, with the Minnesota Rate Cases. The facts in these cases are briefly as follows: The state line of Minnesota on the east and west runs between cities which are in close proximity, that is, there are various twin cities, such as Superior, Wisconsin, and Duluth, Minnesota;

Grand Forks, North Dakota, and East Grand Forks, Minnesota, which, on account of their situations, had always been accorded by the railroad companies serving them like rates in and out. In 1905 and 1906 the State Railroad and Warehouse Commission of Minnesota, pursuant to acts of the state legislature, ordered reduced the class rates on general merchandise twenty and twenty-five per cent, and corresponding reductions were made in commodity and passenger rates. Simultaneously with this compulsory reduction of intrastate rates, the railroads involved, namely, the Northern Pacific Railway Company, the Great Northern Railway Company, and the Minneapolis and St. Louis Railroad Company, in order to prevent discrimination against localities and the consequent loss of business, reduced to a parity their interstate rates to the corresponding twin cities in each group lying outside the State of Minnesota. Whereupon the stockholders of these roads brought suit to restrain the enforcement of these acts of the legislature and orders of the Commission. The stockholders' contentions were: First, that the newly established rates amounted to an unconstitutional interference with interstate commerce; second, that they were confiscatory; and third, that the penalties imposed for their violation were so severe as to result in a denial of the equal protection of the laws and a deprivation of property without due process of law in violation of the Fourteenth Amendment. The lower court sustained the latter contention, which was affirmed by the United States Supreme Court on appeal, the penal and criminal provisions only of the statutes being considered.[63] The lower court then referred the suits to a special master, who took the evidence and made an elaborate report sustaining the complainants' other contentions. The master's findings were confirmed by the United States Circuit Court for the District of Minnesota (Judge Sanborn) and decrees were entered accordingly.[64] From these decrees the Attorney-General of the state and the members of the State Commission appealed to the Supreme Court. Appreciating the gravity of the controversy, the railroad commissioners of eight

[63] *Ex parte* Young, 209 U. S. 123 (1908). Although the rate provisions of the statute were left unsettled so far as the question of interference with interstate commerce was concerned, Mr. Justice Peckham, in rendering the opinion, took occasion to remark (p. 145) that "the question is not, at any rate, frivolous."

[64] 184 Fed. 765 (1911).

states [65] filed their brief as *amici curiae*, as did also the governors of three states,[66] pursuant to a resolution of a conference of the governors of all the states.

The question of the validity of state acts and orders fixing maximum rates was thus presented in two distinct aspects: (1) with respect to their effect on interstate commerce, and (2) as to their alleged confiscatory character. With this second aspect we are not here concerned, and for the purposes of our inquiry the rates fixed by the state will be assumed to be reasonable so far as intrastate traffic is concerned (as they were in fact for the most part found to be by the Supreme Court), that is, rates which the state in the exercise of its legislative judgment could constitutionally fix for intrastate transportation separately considered. With respect to the branch of the cases with which we are here concerned, namely, the effect of these rates upon interstate commerce, the decree of the lower court which was under review was shown to rest upon two distinct grounds: First, that the action of the state imposed a direct burden upon interstate commerce; and second, that it was in conflict with the provisions of the act to regulate commerce.

As to the first proposition, namely, that the action of the State of Minnesota in prescribing new and lower intrastate rates thereby imposed a direct burden upon interstate commerce, the conclusion of the Supreme Court that it did not must be accepted as sound. But the qualification placed by the court, without a dissenting vote to be sure, upon the state's authority over intrastate rates is believed to contain an enunciation of congressional power which was not only unnecessary for the decision in these cases, but which has no support in former decisions, and which, furthermore, if acted upon in future instances, may give rise to an alarming conflict between state and federal interests detrimental to the preservation of our dual form of government.

"Was the state," asks Mr. Justice Hughes, "in prescribing a general tariff of reasonable intrastate rates otherwise within its authority, bound not to go below a minimum standard established by the interstate rates made by the carriers within competitive districts? If the state power, independently of federal legislation,

[65] Nebraska, Iowa, Kansas, South Dakota, North Dakota, Oklahoma, Missouri and Texas.

[66] Ohio, Nebraska and Missouri.

is thus limited, the inquiry need proceed no further." [67] The court declares that the state power is not so limited because, as we have seen, Chief Justice Marshall indelibly wrote upon our constitutional jurisprudence in the case of *Gibbons* v. *Ogden*, that the completely internal commerce of a state is reserved for the state itself. But, adds the court:

"This reservation to the states manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 405, 426; *The Daniel Ball*, 10 Wall. 557, 565; *Smith* v. *Alabama*, 124 U. S. 465, 473; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618, 619; *Southern Railway Co.* v. *United States*, 222 U. S. 20, 26, 27; *Mondou* v. *New York, N. H. & H. R. R. Co.*, 223 U. S. 1, 47, 54, 55.

"The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. *Cooley* v. *Board of Wardens*, 12 How. 299, 319; *Ex parte McNiel*, 13 Wall. 236, 240;

[67] 230 U. S. 397–98.

Welton v. *Missouri*, 91 U. S. 275, 280; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 204; *Bowman* v. *Chicago, etc. Railway Co.*, 125 U. S. 465, 481, 485; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Hefley*, 158 U. S. 98, 103, 104; *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370, 378; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 436.

"The principle, which determines this classification, underlies the doctrine that the states cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains." [68]

Considering first those subjects which require a general system or uniformity of regulation and over which therefore the power of Congress is exclusive, the court cites a great number of cases, of which the leading ones have already been referred to in this article, maintaining the freedom of interstate commerce from all modes of direct interference by the states, the most typical example of which being, of course, taxation in its varied forms.

The court then proceeds, by an exhaustive digest of cases, to consider those matters admitting of diversity of treatment according to the special requirements of local conditions, wherein, as we have seen, by virtue of the principle of so-called concurrent powers developed during the States' Rights period, 1829 to 1876, the states may act within their respective jurisdiction until Congress see fit to act. Whereupon the court, with a directness and brevity that is almost startling, asserts, "These principles apply to the authority of the state to prescribe reasonable maximum rates for intrastate transportation." [69] But do they? It is believed that an affirmative answer finds no support in any decision of the Supreme Court. Herein lies the radicalism and, it is believed, also the weakness of the court's opinion. The remarkable prescience of the members of the court is doubtless responsible for this inconsistency. At least it is difficult of explanation in any other way than by saying that the Justices foresaw, and feared, the economic difficulty that would inevitably arise in the almost immediate future had they dismissed the cases with an opinion that the power

[68] 230 U. S. 399–400.

[69] *Ibid.*, 412.

of the states over intrastate rates was unqualifiedly plenary within their given sphere. They fully realized that new physical conditions had produced the anomaly of a double action of legislative powers upon business which is, and which should be, economically speaking, a unit and under the control of one body, the national government. They appreciated the gravity of the situation, and saw that some measure was unquestionably needed to relieve the business of transportation from the confusing and destructive dominance and jealousies of numerous state commissions, whereby effective authority on the part of the Interstate Commerce Commission was vitiated. So, as it seems, constructive statesmanship absorbing their minds at the expense of a more narrow, yet a more correct judicial course of reasoning, they vaulted the difficulty and dismissed the question as having been settled by prior decisions, after a short, unconvincing analysis of those decisions, — unconvincing because in none of the cases cited by the court, and it is believed in none others that have been decided, do we find any enunciation of the doctrine that the power of the states over intrastate rates is servient to the power of Congress over interstate rates. On the contrary, all of the decisions assert that the state's power is and always has been, since the adoption of the Constitution, unqualifiedly plenary within its own sphere. This must be true from the very character of our dual form of government. The power to tax, as Chief Justice Marshall said, is the power to destroy, so the federal government cannot tax state instrumentalities,[70] and *vice versa*, a state may not tax the instrumentalities of the federal government.[71] This is all that Chief Justice Marshall meant when in *Brown* v. *Maryland* he said:

"That which is not supreme must yield to that which is supreme." [72]

Similarly, while the treaty power, which is vested in the President and the Senate, is supreme, it may not be so arbitrarily extended as to usurp other powers granted either to the federal

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[70] The Collector *v.* Day, 11 Wall. (U. S.) 113 (1870). But see also Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533 (1869); South Carolina *v.* United States, 199 U. S. 437 (1905).

[71] M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316 (1819); California *v.* Central Pac. R. R. Co., 127 U. S. 1 (1888).

[72] 12 Wheat (U. S.) 448.

government or to the states. It may be abused, to be sure, yet this is not usurpation. A colorable exercise of a power is not a valid exercise of a power, and, therefore, just as a treaty must be confined to those matters which are properly subjects for international, not internal, negotiations, just so must the exercise by Congress of its power over interstate commerce be confined to matters which are actually within the domain of interstate commerce. Congress cannot under the guise of this power usurp other fields of governmental regulation, whether belonging properly to the states or to the federal government. A few years ago, in a case involving the reclamation of arid lands in the West, the federal government claimed the paramount right to control the waters of the Arkansas River to aid in the reclamation of these lands. But the court, in a masterly opinion by Mr. Justice Brewer, turned a deaf ear to the alluring argument of expediency and denied this right, saying:

"The preamble of the Constitution declares who framed it, 'we the people of the United States,' not the people of one state, but the people of all the states, and Article X reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning. . . .

"At the time of the adoption of the Constitution within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the state, in which any particular tract of such land was to be found, and the Constitution, therefore, makes no provision for a national control of the arid regions or their

reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the National Government. But if no such power has been granted, none can be exercised." [73]

True, in the case just referred to, the court was not called upon to construe express language of grant, but rather of restriction. But correct constitutional interpretation must necessarily be the same in both directions, as is explained in this case, namely, liberal construction, yet at the same time fidelity to both the spirit and purpose of the instrument.

Let us consider in more detail the cases relied upon in the Minnesota opinion to establish the principle of a dominant federal and a servient state power over intrastate rates. The first cases considered by the court are the Granger Cases. We have already analyzed the language of these cases when they were considered under the Extreme States' Rights Period, and we found that the *dormant* power referred to in all of them was the *dormant power of Congress over interstate* commerce, for the question was whether the states could regulate this commerce in the absence of congressional regulation, and *not*, as in the Minnesota Cases, *whether Congress could ever regulate intrastate* commerce. Obviously the questions are totally different. This part of the decisions in the Granger Cases, is, as we have seen, and as the court in the Minnesota Cases points out, no longer law because soon repudiated in the case of *Wabash, St. L. & P. Ry. Co.* v. *Illinois*. "But," said Mr. Justice Hughes in referring to this case, "no doubt was entertained of the state's authority to regulate rates for transportation that was wholly intrastate." [74] More than this, Mr. Justice Miller, in delivering the opinion of the court, and in repudiating the doctrine of the earlier cases that until Congress acted, the states might regulate interstate commerce, used these words: "Though it is true that . . . the question of the exclusive right of Congress to make such regulations of charges as any legislative power had the right to make, to the exclusion of the states, was presented, it received but little attention at the hands of the court, and was passed over with

[73] Kansas *v.* Colorado, 206 U. S. 46, 90–92 (1907).
[74] 230 U. S. 415.

the remarks in the opinions of the court which have been cited." [75] All of these remarks have been quoted. This principle received *no* attention at the hands of the court in the Wabash Case. How then can any of these cases be properly considered as authority, in even the slightest degree, for the principle of a dominant federal and a servient state power as announced by Mr. Justice Hughes?

From the remaining case relied upon by the court in this branch of its opinion, namely, *Stone* v. *Farmers' Loan and Trust Co.*, one of the so-called Railroad Commission cases, to which reference has already been made in this article, Mr. Justice Hughes quotes the following language, affirming the plenary power of the state over its internal commerce and giving no suggestion that this power is servient to Congress: "It [the state], may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi." [76]

So much for the cases relied upon by the court in the first part of its opinion. In the second part of its opinion, wherein the scope of the Interstate Commerce Act is discussed (which we shall consider later), numerous other cases of similar import are cited, but in none of them is language found which in any way qualifies the principle that the state's power over intrastate rates is plenary. "The decisions of this court since the passage of the act to regulate commerce," says Mr. Justice Hughes, "have uniformly recognized that it was competent for the state to fix such rates, applicable throughout its territory. If it be said that in the contests that have been waged over state laws during the past twenty-five years, the question of interference with interstate commerce by the establishment of state-wide rates for intrastate traffic has seldom been raised, this fact itself attests the common conception of the scope of state authority." [77] Then follows an analysis of decisions, all of which confirm in unmistakable terms the plenary power of the states.[78]

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[75] 118 U. S. 569–70 (1886).

[76] 116 U. S. 307, 334 (1886).

[77] 230 U. S. 423.

[78] *Ibid.*, 423–33. It must, in fairness, be admitted that the principle of the Minnesota decision seems to have been predicted, with little reasoning, however, in one or

Transportation is wholly within a state or it is not. There can be no doubt as to the separability. The adjudications by the Supreme Court dealing with the question of when an interstate shipment ceases to be such and becomes intrastate, and also with the taxation of the gross receipts of carriers are entirely sufficient to set at rest any doubt on this point.[79] Clearly, if intrastate business is separable from interstate business, so must intrastate rates be separable from interstate rates, because rates are the symbol of business. They are the receipts which are declared separable for the purpose of taxation. If separable for that purpose, why are they not equally separable for the purpose of regulation? Suppose, for example, a railroad doing *solely an intrastate* business, operating in and out of the same terminals, as another railroad engaged *solely in interstate* business. Suppose, further, that the former road, in order to get the business of the latter, by fostering certain intrastate localities, greatly reduces its rates to these localities, which the interstate road either does not reach, or if it does, then only by an interstate route. Can it be denied that the economic necessity thus imposed upon the latter road to reduce its rates in order to meet the competition of the former is clear and direct? Yet can there be any question whatsoever as to the complete separability and independence of the two railroads, and therefore of their respective businesses? Suppose, further, that the state itself elected to construct and operate the purely intrastate railroad, instead of merely regulating it under private ownership. Could not the state have put into effect any rates that it chose, provided only they were not so exorbitant as to be confiscatory to the public? Certainly, and no authority, upon com-

two opinions of courts of inferior jurisdiction, and by one or two authors. See especially Woodside *v.* Tonopah & G. R. Co., 184 Fed. 358; "Congress and Intrastate Commerce," 9 COL. L. REV. 38, by David W. Fairleigh. Mr. Fairleigh bases his argument on the theory of agency, which is unconvincing, and unsupported by authority.

[79] See three articles by the author, "Constitutional Limitations upon State Taxation of Foreign Corporations," 11 COL. L. REV. 393; "The Commerce Clause and Intrastate Rates," 12 COL. L. REV. 321; "The Vanishing Rate-making Power of the States," 14 COL. L. REV. 122. See also United States Express Co. *v.* Minnesota, 223 U. S. 335; Atchison, etc. Ry. Co. *v.* O'Connor, 223 U. S. 280; Oklahoma *v.* Wells, Fargo & Co., 223 U. S. 298; Bacon *v.* Illinois, 227 U. S. 504; Susquehanna Coal Co. *v.* South Amboy, 228 U. S. 665; Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68; Gulf, Colorado & S. F. Ry. Co. *v.* Texas, 204 U. S. 403; Ohio R. R. Commission *v.* Worthington, 225 U. S. 101.

plaint that interstate rates were thereby affected, could have called it to account. If such would be the position of a state operating its own intrastate lines, wherein lies the difference when it authorizes a corporation, as its creature and agent, to perform the same function?

It may be asked, why may not Congress regulate intrastate rates, if it may require, as the Supreme Court has decided,[80] the use of safety appliances on purely intrastate trains? The reason is that while interstate and intrastate rates may be interdependent for economic or geographical reasons, this is not the same direct interdependence that necessarily exists between trains or cars operated over the same tracks. A rate is a charge for, not an instrument of transportation. Of course, physical interdependence is not *per se* the one and only criterion by which we determine whether or not the necessity for uniformity is real or potential, but this much we must find, namely, that the exercise of state authority, whether it be regulatory of rates, hours of labor, employers' liability, the equipment or inspection of rolling stock, or what not, necessarily impinges upon and burdens in a relatively immediate way the full exercise of federal authority. We do so find in the case of safety appliances, because of the direct connection between the equipment used in the two kinds of traffic. There is an inseparable interdependence of the very objects of the legislation.[81] But the court did not, nor can it find the same relation between interstate and intrastate rates. Why then, if these two classes of rates are separable, should the court say that the action or non-action of Congress is the controlling factor? If these two classes of rates are separable, the power of the state over the intrastate rates must be plenary and exclusive, not servient, unless we do violence to the very words of the Constitution and to that long line of decisions, beginning with *Gibbons* v. *Ogden*, which have just been analyzed.

The decision in *Southern Railway Co.* v. *United States*, the safety-appliance case, just referred to, clarifies, when properly analyzed,

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[80] Southern Railway Co. *v.* United States, 222 U. S. 20 (1911). See also Southern Railway Co. *v.* Crockett, 234 U. S. 725.

[81] A somewhat kindred situation arose in the car distribution cases. See Interstate Commerce Commission *v.* Illinois Central R. R. Co., 215 U. S. 452 (1910); Baltimore & Ohio R. R. Co., *ex rel.* Pitcairn Coal Co., 215 U. S. 481 (1910); Morrisdale Coal Co. *v.* Penna. R. R. Co., 230 U. S. 304 (1913).

the distinction which, it is believed, underlies the Minnesota Cases. In every case cited by the Supreme Court to prove the principle that the plenary nature of the state's power depended upon the non-action of Congress, *the legislation in question operated directly upon the instrumentalities of interstate commerce or upon the very subject-matter of interstate commerce itself.* Herein lies the distinguishing feature which the court seems disposed to overlook. The character of the legislation clearly shows this: pilotage regulations, protection and improvement of navigable waters, regulation of wharfage charges or tolls, quarantine regulations, inspection laws, laws governing nonfeasance or misfeasance of interstate carriers. These involve no question of regulation by a state of a purely internal matter, but rather the regulation by a state of matters on their face interstate, and therefore governed, as we have seen, by the principle of concurrent powers. It was over these very matters that the controversy, out of which finally emerged the principle of concurrent powers, was waged for many years, and the whole basis of the controversy was the fact that these matters were *interstate.*

A case not referred to by the court, *Interstate Commerce Commission* v. *Goodrich Transit Company*,[82] may seem at first blush to bridge the gap between the cases referred to, and to establish a precedent for the court's reasoning in the Minnesota Cases. In that case it was held that the Interstate Commerce Commission could compel an interstate carrier to disclose the records of all its business, including that which is purely intrastate. In answer to the argument that this was an unconstitutional usurpation of power by the federal government, the court replied that "the requiring of information concerning a business is not a regulation of that business." [83] Similarly, the court had previously held that because an injury to an interstate employee might be inflicted by a purely intrastate employee, the second federal employers' liability act covering such a case was not thereby invalid as a regulation of intrastate commerce, because, as the court said, it is a mistaken theory "that treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power." [84]

[82] 224 U. S. 194 (1912). [83] *Ibid.*, 211.

[84] The Second Employers' Liability Cases, Mondou *v.* N. Y., N. H. & H. R. R. Co., 223 U. S. 1, 51 (1912).

In other words, it was again the instrumentality of interstate commerce, a human instrumentality in this case, that the act directly concerned, and that only. The first federal employers' liability act was declared void [85] for the very reason that it comprehended the regulation of matters wholly intrastate, — the employment of persons engaged wholly in intrastate commerce, — in short instrumentalities of such commerce. If this is forbidden, wherein lies the distinction upon which to base the opinion of the court in the Minnesota Cases that Congress may regulate the rates of such commerce?

Turning now to a consideration of the further question whether the action of the State of Minnesota was repugnant to any provision of the Interstate Commerce Act, the court in the Minnesota Cases also answered this in the negative, by demonstrating that purely intrastate commerce had always been expressly excepted from the operation of the act by the proviso contained in the first section. "The fixing of reasonable rates for intrastate transportation was left," said the court after giving a history of the act, "where it had been found; that is, with the states and the agencies created by the states to deal with that subject. *Missouri Pacific Ry. Co.* v. *Larabee Mills*, 211 U. S. 612, 620, 621." [86] Thus far the court's reasoning is clear, succinct and eminently sound. When pressed, however, with the more troublesome argument that the provisions of Section 3 of the act, prohibiting carriers from giving an undue or unreasonable preference or advantage to any locality, applied to an unreasonable discrimination between localities in different states, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rates exclusively, the court reserved its opinion, in accordance with its prior rulings,[87] because the Interstate Commerce Commission had made no finding in regard to the Minnesota rates, and no action

[85] Employers' Liability Cases, 207 U. S. 463 (1908).

[86] 230 U. S. 421.

[87] Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426 (1906); Baltimore & Ohio R. R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481 (1910); Robinson *v.* Baltimore & Ohio R. R. Co., 222 U. S. 506 (1912); United States *v.* Pacific & Arctic Co., 228 U. S. 87 (1913). See also Louisville & Nashville R. R. Co. *v.* Cook Brewing Co., 223 U. S. 70 (1912); Pennsylvania R. R. Co. *v.* International Coal Co., 230 U. S. 184 (1913); Mitchell Coal Co. *v.* Pennsylvania R. R. Co., 230 U. S. 247 (1913); Morrisdale Coal Co. *v.* Pennsylvania R. R. Co., 230 U. S. 304 (1913).

of that body was before the court for review. However, as we shall see, this question was not to be reserved for long.

The court again proceeded with an analysis of cases which we have earlier considered, in order to confirm the principle that after the passage of the Interstate Commerce Act, just as before, the state continued to possess that state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic.

In concluding, the court reverted to its theory, expressed earlier in the opinion, of a dominant federal and a servient state power, and virtually said that the Interstate Commerce Act might be amended without amending the Constitution so as to include specifically the regulation of intrastate rates.

"If the situation has become such," said the court, "by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should apply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of federal action, may we deny effect to the laws of the state enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power." [88]

Of what real value could it be to declare that, in so far as the reasonableness *per se* of local rates is concerned, the present Interstate Commerce Act necessarily forbids, by express proviso, any interference by the federal government, when at the same moment it is declared with greater emphasis that this power of the states over their local rates is supreme *only until Congress acts?* This indeed pointed the way to destruction of state power. And the way was not a difficult one. In fact it proved to be shorter than it seemed from the court's language. The Interstate Com-

[88] 230 U. S. 432–33.

merce Commission, ever zealous for greater authority, anticipated the opinion of the Supreme Court on the question that was reserved in the Minnesota opinion, and within a year from the rendering of that opinion has, it is believed, in the Shreveport Cases [89] virtually accomplished without any additional legislation whatsoever all that that opinion pointed out might be done only by additional legislation. State regulation of intrastate rates seemed doomed by the Minnesota Cases, but certainly its death was not expected to come so soon. Let us see what are the facts in the Shreveport Cases and exactly what the court decided.

In 1911 the Railroad Commission of Louisiana filed a petition with the Interstate Commerce Commission against the Texas & Pacific Railway Company, the Houston East and West Texas Railway Company, and various other carriers, the basis of the complaint being that the carriers made rates out of Dallas and other Texas points into eastern Texas, which were much lower than those which they extended into Texas from Shreveport, Louisiana. Shreveport is about forty miles from the Texas state line, and two hundred and thirty-one miles from Houston, Texas. It is one hundred and eighty-nine miles from Dallas. It competes with both Houston and Dallas for the trade of the intervening territory. The rates from Dallas and Houston, respectively, eastward to intermediate points in Texas, were much less, according to distance, than from Shreveport westward to the same points. It was undisputed that the difference was substantial and injuriously affected the commerce of Shreveport. Such was the frank purpose of the Texas commission. For example, the rate on furniture from Dallas to Longview, Texas, 124 miles, was 24.8 cents per hundred pounds, while the rate from Shreveport to Longview, 65.7 miles, was 35 cents.

The order of the Interstate Commerce Commission had two phases. First, it established maximum class rates out of Shreveport to certain-named Texas points, which were substantially the same as the class rates which had been fixed by the Texas Commission and charged by the carriers for transportation for similar distances within the State of Texas. Second, the Commission held that maintaining lower commodity rates (which are specially re-

[89] 234 U. S. 342.

duced class rates) from Dallas and Houston to points in Texas than were in force from Shreveport to such points, under substantially similar conditions and circumstances, created an unjust discrimination against Shreveport in favor of the Texas points.[90] The carriers complied with the first part of the order and established the class rates, but still left in effect their low intrastate commodity rates which the Commission declared caused the above discrimination. The point of objection to complying with the second part of the order was that, since the discrimination found by the Commission to be undue arose out of a relation of intrastate rates, maintained under state authority, to interstate rates that had been upheld as reasonable, its correction was beyond the Commission's power. On appeal to the Commerce Court, that court held that the Commission's order relieved the railroads from all further obligation to observe the intrastate rates, and that they were at liberty to comply with the Commission's requirements by increasing these rates sufficiently to remove the forbidden discrimination.[91] Thus, when the case reached the Supreme Court, the invalidity of the order of the Commission was challenged upon two grounds: First, that Congress is impotent to control the intrastate charges of an interstate carrier, even to the extent necessary to prevent injurious discrimination against interstate traffic. Second, that if it be assumed that Congress has this power, still it

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[90] See Meredith *et al.*, constituting the Railroad Commission of Louisiana *v.* St. Louis S. W. Ry. Co. *et al.*, 23 I. C. C. Rep. 31.

[91] Texas & Pacific Ry. Co. *v.* U. S. (Interstate Commerce Commission *et al.*, Interveners), 205 Fed. 380 (1913); Houston East & West Texas Ry. Co. *et al. v.* United States (Interstate Commerce Commission *et al.*, Interveners), 205 Fed. 391 (1913).

The opinion in the Commerce Court was written by Judge Knapp, presiding judge. Judge Mack filed a concurring opinion, but with considerable hesitancy. He said: "Inasmuch, however, as there seems to be some basis, though slight, for the view that the failure of the railroads to attack the Texas rates was due to their voluntary or negligent acquiescence therein, and that therefore these rates may be said to have been not compelled, but voluntary, in the sense of having been voluntarily assented to, instead of having been actively attacked, and inasmuch as the conclusions of my brethren are based in part at least upon this view, I concur, for this reason only, in upholding the Commission's order" (p. 391). Senator Sewell of New Jersey offered an amendment to the bill expressly conferring jurisdiction over the exact situation presented in the Shreveport cases. Whereupon it was rejected, due to the explanation of Senator Cullom, and others that the same proposition had already been weighed in committee, and rejected because believed to be unconstitutional. This is all a matter of history.

has not been exercised, and hence the action of the Commission exceeded the limits of the authority which has been conferred upon it.

Both of these grounds were declared untenable, and the court affirmed in full the orders of the Commission and the Commerce Court. As to the first ground, the result was to be anticipated, because virtually decided in the Minnesota Cases, as we have just seen. But not so as to the second ground. Indeed, three of the seven Interstate Commerce Commissioners had denied [92] that the

[92] Six separate opinions were written, the majority opinion by Commissioner Lane, and concurring opinions by Commissioners Prouty (chairman) and Clark, while dissenting opinions were written by Commissioners Clements, Harlan and McChord.

Commissioner Lane's opinion is totally unconvincing from a legal standpoint. He thus concludes: "The interstate carrier which adopts a policy, even under state direction, that makes against the interstate movement of commerce must do so with its eyes open and fully conscious of its responsibilities to the federal law which guards commerce 'among the states' against discrimination.

"It is suggested that the exercise of such power to end discrimination between rates within a state and rates to interstate points must surely lead to a conflict in which the jurisdiction of one sovereignty or the other must give way. To this suggestion the one and sufficient answer is that when conditions arise, which in the fulfillment of its obligation and the due exercise of its granted power to regulate commerce among the states make such course necessary the national government must assume its constitutional right to lead." 23 I. C. C. Rep. 46.

Chairman Prouty, contrary to Commissioner Lane, expressly stated that prior decisions of the Commission should be overruled, when inconsistent with the view of the majority in this case. "When the federal authority does act, then the state cannot by its action interfere, for in case of actual conflict the state must yield." 23 I. C. C. Rep. 50.

Commissioner Clark said: "Whether or not the Congress has exercised its jurisdiction in these premises and whether or not it has delegated to us power to remove such discriminations and preferences are questions which apparently can never be settled until they have been passed upon by the court that is empowered to speak the last word. In this question as between two states possessing equal rights under the Constitution and equal rights to federal protection, discrimination that is unjust or preference that is undue, should, I think, be abated by federal authority, and so long as there is doubt it should be resolved in favor of that course which is harmonious with the fundamental and recognized purpose of the act to regulate commerce." 23 I. C. C. Rep. 51–52.

Commissioner Clements, mindful of the express limitations of the act, said: "The conclusion and order of the Commission in this case mark a new departure, in the interpretation of the statute as to the scope of its authority, from its steadfast attitude toward this fundamental question in all previous cases." 23 I. C. C. Rep. 53.

Commissioner Harlan: "I think that the Congress, in aid, or rather in protection, of interstate commerce may forbid discriminations by a railroad or other instrument of interstate traffic in favor of state traffic. This, however, it has not yet undertaken to do." 23 I. C. C. Rep. 54–55.

Commissioner McChord's dissenting opinion is eminently logical and sound, and

act gave them such power, desirable as it was. Justices Lurton and Pitney also dissented, but without expressing any reasons, which is to be regretted in such an important case.

The decision is meagre and unconvincing, as an example of statutory construction, and as such it must be primarily considered because the first consideration, that is, whether the order of the Commission was invalid on the ground that it exceeded the authority which Congress could lawfully confer, was disposed of by the Minnesota Cases, and the opinion of the court adds nothing to what had already been said. There is apparently the same disposition to confuse the action of Congress, through the Commission, with prior congressional action which operated directly upon the instrumentalities, or the very subject-matter of interstate commerce itself. Instrastate rates are never the instrumentalities or subject-matter of interstate commerce. Unless they represent that completely internal commerce of a state which since the time of *Gibbons* v. *Ogden* had been thought to be securely reserved to the states themselves, when can there ever be such commerce? Note the language of the court after analyzing the undisputed authority of the various cases dealing with the paramount power of Congress over safety appliances, hours of labor, employers' liability and the like:

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in complete accord with prior decisions. He thus summarizes: "My position is that this Commission should confine itself within the four corners of the law of its creation, usurping neither the legislative function of the Congress nor the judicial power of the courts." 23 I. C. C. Rep. 63.

See in the Matter of Freight Rates, 11 I. C. C. Rep. 180; Hope Cotton Oil Co. *v.* Texas & Pacific Ry. Co., 12 I. C. C. Rep. 266; Reliance Textile & Dye Works *v.* Southern Ry. Co., 13 I. C. C. Rep. 48; Williams Co. *v.* Vicksburg, S. & P. Ry. Co., 16 I. C. C. Rep. 482; Andy's Ridge Coal Co. *v.* Southern Ry. Co., 18 I. C. C. Rep. 405; Saunders *v.* Southern Express Company, 18 I. C. C. Rep. 415; Alpha Portland Cement Co. *v.* B. & O. R. R. Co., 22 I. C. C. Rep. 446. In fact, since the opinion in the Shreveport Case the Commission refused to remedy a discriminative situation growing out of state rates, but in so doing failed to distinguish the Shreveport Case. Southwestern Shippers Traffic Assn. *v.* Atchison, T. & S. F. Ry. Co., 24 I. C. C. Rep. 570; but see Loeb *v.* T. & P. Ry., 24 I. C. C. Rep. 304, and Keogh *v.* Minn., St. P. & S. Ste. M. Ry. Co., 26 I. C. C. Rep. 73. See also Cement Rates from Pa. to N. J., 26 I. C. C. Rep. 687; Curry & White Co. *v.* D. & I. R. R., 30 I. C. C. Rep. 1; Carroll Brough & Robinson *v.* Atchison, Topeka & Santa Fe Ry. Co., 31 I. C. C. Rep. 466; Corporation Commission of Oklahoma *v.* Atchison, Topeka & Santa Fe Ry. Co., 31 I. C. C. Rep. 532.

"While these decisions sustaining the federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled." [93]

Well-sounding phrases these, but totally illogical. Since, as the Supreme Court has many times said in determining whether state legislation has unduly burdened interstate commerce, it must look through form to substance — must consider the real effect of the state legislation — why should it not do the same when the situation is reversed? For each power is equally plenary within its given sphere. Why did not the Supreme Court in both the Minnesota and Shreveport Cases face the situation squarely and admit that amendment of the Constitution, difficult as it is of attainment — and rightly so — is the only true remedy? "The power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress," [94] reiterates the court. Yet in order to prove this the court relies upon a case, *Louisville & Nashville R. R. Co.* v. *Eubank*, which we have previously considered, wherein it was expressly held that if Congress had regulated the interstate rate there involved "there would be in that case no interference with or regulation of interstate commerce directly or indirectly by the state, its action could have no possible effect upon the interstate rate, as the amount of the charge would be regulated by the body with which the right of regulation exists." [95]

To use the words of Justice Brewer, dissenting in the Eubank Case, "it is strange to be told that the action of a carrier in fixing interstate rates is potent to render unconstitutional the legislation of the state respecting local rates, when the like action of Congress in prescribing interstate rates is not so potent. In other words,

[93] 234 U. S. 353. See in this connection, Louisville & Nashville R. R. Co. *v.* Higdon, 234 U. S. 592.

[94] *Ibid.*, 354.

[95] 184 U. S. 41.

action by the carrier in pursuit of its own financial interests overturns the constitution and statute of the state when like action by Congress in the exercise of its constitutional power does not." [96] Does not the reasoning of Justice Hughes in the Shreveport Cases more nearly support the minority rather than the majority opinion in the Eubank Case?

Turning now to the second and really the vital question in the Shreveport Cases, namely, whether the Interstate Commerce Commission exceeded the authority given to it under the Interstate Commerce Act, the court, with a mere wave of its hand, sweeps aside the controlling proviso in Section 1 of the act, expressly excluding intrastate commerce from its jurisdiction. The whole history of the debates over the passage of the act, which the court cautiously avoids, would seem to show that it would never have been passed had it been believed to be capable of the construction which the Supreme Court has now placed upon it. [97] Clearly, this is judicial legislation. How could the court so soon erase what it had said in the Minnesota Cases, — that it is not its function "under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon"? [98]

With equal ease the court overrules the case of *East Tennessee, etc. Ry. Co.* v. *Interstate Commerce Commission* [99] in order to accomplish its purpose, though of course without admitting that it does. Thirteen years before, it had decided in that case that the prohibition of Section 3 of the act was directed only against unjust discrimination and undue preference arising from the voluntary and wrongful act of the carriers, and did not relate to acts the result of conditions wholly beyond the control of the carriers, such as competition, and presumably therefore statute, court decree or order of an administrative, or semi-judicial body. "In the view that the Commission was entitled to make the order, there is no longer compulsion upon the carriers by virtue of any inconsistent local requirement," [100] now says the court, and thus the case of *East Tennessee, etc. Ry. Co.* v. *Interstate Commerce Commission* is summarily disposed of by assuming as a premise the very question

[96] 184 U. S. 45.
[97] See Congressional Record, 49th Congress, 1st Session, vol. 17, pp. 3722, 4404.
[98] 230 U. S. 433. [99] 181 U. S. 1 (1901).
[100] 234 U. S. 359. See also Intermountain Rate Cases, 234 U. S. 476.

to be proved.[101] "We are not unmindful," says the court, concluding its opinion, "of the gravity of the question that is presented when state and federal views conflict. But it was recognized at the beginning that the nation could not prosper if interstate and foreign trade were governed by many masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control." [102]

Thus Mr. Justice Hughes would carry us back again over those ninety years of decisions that we have just reviewed — back to *Gibbons* v. *Ogden* — and have us understand, from the lips of Chief Justice Marshall, that if Congress so wills it there shall be no internal commerce of a state. For such is necessarily to be the result of the Minnesota and Shreveport decisions. In the former the court said that "the situation is not peculiar to Minnesota. The same question has been presented by the appeals, now before the court, which involve the validity of intrastate tariffs fixed by Missouri, Arkansas, Kentucky and Oregon. Differences in particular facts appear, but they cannot be regarded as controlling." [103] These appeals were all decided in conformity with the opinion in the Minnesota Cases.[104] As for the Shreveport decision, it is almost a truism to say that nearly every rate controversy to-day presents a question of discrimination as well as of unreasonableness *per se*. Months before the Shreveport decision was rendered, shippers in states adjoining Minnesota, believing that the court would decide as it has done, filed dozens of complaints based on discriminations which they alleged had resulted from the application of the scale of rates approved in the Minnesota Cases. Before the

[101] The majority of the Commerce Court attempted to distinguish this case on the ground that it primarily involved the long and short haul clause of the original fourth section of the act, rather than the third section, and also on the ground that the administrative authority of the Commission had been materially increased by the amendments of 1906 and 1910, as the Supreme Court observed in Procter & Gamble *v.* United States, 225 U. S. 282, 297.

[102] 234 U. S. 359–60.

[103] 230 U. S. 394.

[104] See Missouri Rate Cases, 230 U. S. 474; Knott *v.* St. Louis S. W. Ry. Co. and 14 other cases, 230 U. S. 509; Knott *v.* St. Louis K. C. & Col. R. R. Co., 230 U. S. 512; Oregon R. R. & Nav. Co. *v.* Campbell, 230 U. S. 525; Southern Pacific Co. *v.* Campbell, 230 U. S. 537; Allen *v.* St. Louis I. M. & So. Ry. Co., Same *v.* St. Louis S. W. Ry. Co., 230 U. S. 553; Louisville & Nashville R. R. Co. *v.* Garrett, 231 U. S. 298. See also Chesapeake & Ohio Ry. Co. *v.* Conley, 230 U. S. 513.

Shreveport decision the Interstate Commerce Commission had no further power after it had fixed the interstate rate at a reasonable maximum. Its hands were tied. Now it has an option of either changing the interstate rate or changing the local rate. Nor is there any persuasive force in the argument that in most instances the Interstate Commerce Commission will proceed with caution, feeling discretion to be the better part of valor, and will elect to exert its influence upon the interstate rate whenever possible.[105] The point is, the *power* to do otherwise is still there.

We have seen how Chief Justice Marshall first gave expression to the exclusive power of Congress in relation to matters purely national, and to the equally exclusive power of the states in relation to matters purely internal. We have seen how as a necessary corollary to these principles he first announced a third principle of concurrent powers, or, as we believe we have more appropriately described them, a dominant federal and a servient state power in matters which, although local in their nature, yet affect interstate commerce. We have seen our highest judiciary vacillating in its acceptance of this third and more novel principle until it was finally established in our constitutional law, as firmly as had been established the two earlier principles. But never, in any of the decisions, have we found support for this new fourth theory which the Minnesota and Shreveport Cases have evolved — the theory of a dominant federal and a servient state power in a field hitherto unconditionally reserved to the states — the field of local rate-making. Further, it is all the more strange to be told that the legislative branch of the government, Congress, through its administrative agent, the Interstate Commerce Commission, and not the judiciary shall determine what is a forbidden interference with interstate commerce. Such is the decision in the Shreveport Cases, for a ruling must first be obtained from the Commission before recourse may be had to the courts, and furthermore, under the provisions of the Interstate Commerce Act, it would seem that the railroads cannot, themselves, institute the necessary proceedings — an undue hardship unquestionably on

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[105] As an example of this caution, see Southwestern Shippers' Traffic Ass'n. *v.* Atchison, T. & S. F. Ry. Co., 24 I. C. C. Rep. 570; Corporation Commission of Oklahoma *v.* Atchison, T. & S. F. Ry. Co., 31 I. C. C. Rep. 532.

the railroads.[106] But why need resort first be had to the Commission? Its function is to determine questions of fact, — whether a given rate is reasonable *per se* or discriminatory in relation to other interstate rates. In an action for damages, therefore, the propriety of the established requirement that a ruling of the Commission be first had, cannot be disputed. But in the Shreveport Cases the question is primarily one of constitutional law, namely, whether what a state has done is a violation of the commerce clause. This is the same question involved in every case that we have considered. In the Eubank Case, upon which the court so much relies, no resort to the Commission was required. Wherein is the difference? The Supreme Court, *ab inconvenienti*, has read out of the Interstate Commerce Act the very passage that rendered it constitutional. After this, to what may not the alluring arguments of expediency lead us?

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[106] See Section 13 of the Interstate Commerce Act.